other valuable securities, has become a recognized branch of commercial jurisprudence; and as such transactions are not confined to a single locality, but extend throughout the civilized world, uniformity of decision is a matter of great public convenience and universal necessity.

Stern and inflexible rules are necessary to give full confidence to those who deal in such securities, so that if such an instrument be made without consideration, or have any other infirmity, the holder taking without knowledge of such facts will be protected.

And about all that is necessary to bring about such a result is the concurrence of a few more of the State Courts, and especially the Courts of Pennsylvania and New York.

Supreme Court of Pennsylvania.

COMMONWEALTH v. McMANUS.

SYLLABUS.

The defendant was tried for murder.

Held, per MITCHELL, J.: That the jury are not judges of the law in any case, civil or criminal.

The determination of the law is no part of their duty or their right.

STATEMENT OF THE CASE.

Appeal from the Court of Oyer and Terminer of Philadelphia County.

On a trial for murder in the first degree, the counsel for the prisoner asked the Judge to charge: "The jury are judges of the law as well as of the facts, and may, upon the whole case, determine the grade of the offence."

The Judge answered this point by saying, "that the jury had been sworn to decide the case on the law and evidence; that the statement of the law by the Court was the best evidence of the law within the jury's reach, and that, therefore, in view of that evidence, and viewing it merely as evidence only, the jury was to be guided by what the Court had said with reference to the law."

The Supreme Court affirmed this answer of the learned Judge as "an accurate and carefully considered answer to the

point, and in entire harmony with *Kane* v. *the Commonwealth*, 89 Pa. 522." Per PAXSON, C. J. Opinion filed, June 5, 1891.

Concurring opinion by MITCHELL, J., filed October 5, 1891.

I concur in affirming this judgment and in the reasons given; but upon one point I would go further, and put an end, once for all, to a doctrine that I regard as unsound in every point of view, historical, logical or technical. The prisoner at the trial requested the Judge to charge the jury that they were "judges of the law as well as of the facts." The learned Judge, feeling himself bound by the language of *Kane* v. *Commonwealth*, 89 Pa. 522, answered that the jury had been sworn to decide the case on the law and the evidence; that the statement of the law by the Court was the best evidence of the law within the jury's reach, and that, therefore, in view of that evidence, and viewing it as evidence only, the jury was to be guided by what the Court had said with reference to the law. The point should, in my opinion, have been answered with an unqualified negative. The jury are not judges of the law in any case, civil or criminal. Neither at common law nor under the Constitution of Pennsylvania is the determination of the law any part of their duty or their right. The notion is of modern growth, and arises undoubtedly from a perversion of the history and results of the celebrated contest over the right to return a general verdict—especially in cases of libel—which ended in Fox's Bill, 32 Geo. 3 C. 60.

In the early days of jury trials, issues that went to the country were usually simple and were probably submitted to the jury without much separation of law and fact by the Judge, and in that sense juries decided the law. But the distinction between questions of law and fact and the tribunals for their decision respectively lies at the foundation of our judicial system, and there was no time when it did not exist. The rule of *questionem facti non respondent judices, ad questionem juris non respondent juratores*, was an ancient maxim in the days of Coke (Coke Litt. 155 a; 8 Rep. 155 a; 9 Rep. 13 a); and Mr. Bigelow, treating of the class of cases raising questions of law, or some question of fact properly belonging to the Court to decide, quotes the case of the *Archbishop of Canterbury* v. *Abbot of Battel Abbey*, 1 Rotul 143, *tempore* Stephen, which "turned upon a question of law, and

was decided (without appointment of a trial term) just as a modern case of the kind would be decided, by a submission of the point of law in the question to the determination of the Court, and not to some test imposed by the parties:" Hist. of Procedure in England during the Norman Period, by M. M. Bigelow, p. 286. Nor was there any distinction in respect to the merely incidental way in which juries passed upon matters of law between civil and criminal cases. They might return a general or a special verdict in either, but they early sought to escape the obligation of giving a general verdict, because it subjected them to the risk of an attaint; and Coke says, "Some Justices did rule over the recognitors to give a precise or direct verdict without finding the special matter:" 2 Inst. 422. To relieve juries from the burden, the Statute of Westminster, 2 C. 30, enacted, "*Quod Justiciarii ad assisas capiend assignati, non compellant juratores dicere praecise si sit disseisina vel non, dummodo dicere volunerint veritatem facti, et petere auxilium Justic;*" and commenting upon this section, Coke says, "In the end it has been resolved that in all actions, real, personal and mixed, and upon all issues joined, general or special, the jury might find the matter of fact pertinent, . . . and thereupon pray the discretion of the Court for the law; and this the jurors might do at the common law, not only in cases between party and party, whereof this Act putteth an example of the Assise, but also in pleas of the Crown:" 2 Inst. 425. It is a striking illustration of the uniformity of human motives at all periods that, while the attaint remained as a remedy for perversity or favoritism, the struggle of juries was to escape the obligation of general verdicts, and to maintain the right of special findings of fact; but when the decline and final disuse of the attaint rendered them practically irresponsible, the struggle was reversed, and juries asserted stoutly the right to give general verdicts, while the tendency of lawyers and Judges was to confine them to special findings of fact, and to have the Court pronounce the result as a matter of law. The period of transition was long, and changes slow. It was clearly and justly felt that juries, as judges of the law, in any but an incidental way, were an anomaly in the system, and perhaps those who endeavored to do away with it claimed too much. Safety was thought to reside in the retention by juries of the right to give general verdicts. In view of the constant and notorious

failure of justice in certain classes of cases, by the occasional perversity and the frequent cowardice of juries, it may be doubted whether it would not have produced better results to have enlarged the power of Judges to compel special verdicts; but however this may be, the right of juries to give general verdicts, especially in criminal cases, has been maintained, and the last contest made on it was in regard to libel. The exact line between law and fact, not always easy to draw, presented in the case of libel some special difficulties, technical and other. The alleged libel being in writing, its terms were not in dispute, and naturally fell to the Court to pass upon, as other writings did; and the intent, libellous or otherwise, being claimed as a legal inference, there was nothing left in dispute but the fact of publication and the truth of the innuendo. Accordingly, the juries in the Dean of St. Asoph's case, and the *King* v. *Withers*, 3 Tem. Rep. 428, were confined to these two points; and it was to counteract these rulings of Buller and Mansfield and Kenyon (though it cannot be disputed that they were in accordance with long-settled practice), and to secure in libel, as in other cases, the right of the jury to find a general verdict upon the whole matter in issue, that the Act of 32 Geo. 3 C. 60 was passed. The text of that famous statute is worth quoting, to show how little foundation it affords for the superstructure that is sought to be built upon it. It is entitled "An Act to remove Doubts respecting the Functions of Juries in Cases of Libel," and its language is: "Whereas, doubts have arisen whether, on the trial of an indictment . . . . for the making or publishing any libel where an issue is joined . . . . on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same to give their verdict upon the whole matter in issue. Be it therefore declared . . . . that, on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the Court or Judge before whom such indictment or information shall be tried to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

"Provided, always, that, on every such trial, the Court or

Judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and discretion to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases.

"Provided, also, that nothing herein contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict in their discretion, as in other criminal cases.

"Provided, also, that in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such grounds and in such manner as by law he or they might have done before the passing of this act; anything herein contained to the contrary notwithstanding."

Nothing could be clearer than the care with which this act was directed to the exact point in controversy—the right to render a general verdict of guilty or not guilty upon the whole issue in case of libel—and the equal care with which the right of the Court to pass finally upon the questions of law was preserved by the provisos, that the Judge should give the jury his "opinion and directions," and that a verdict should still not be conclusive of the law against a defendant, but he should have his right to an arrest of judgment as theretofore enjoyed. The claim that juries were to be judges of the law was thus intentionally and carefully excluded.

The Constitution of Pennsylvania was made in 1790, two years before Fox's Libel Act. The controversy was then at its height, and the subject commanded popular attention. In fact, Pennsylvania had borne rather a distinguished part in the discussion, and the speech of Andrew Hamilton, in the trial of John Peter Zenger, was regarded as the vindication of popular rights, and not only quoted as such by Erskine, but referred to, among other authorities, by Hargrave: Coke Litt. 155 b. "No lawyer," says Mr. Binney, "can read that argument without preceiving that, while it was a spirited and vigorous though rather overbearing harangue, which carried the jury away from the instruction of the Court, and from the established law of both the colony and the mother country, he argued elaborately what was not law anywhere, with the same confidence as he did the better points of his case. It is, however, worth remembering, and to his honor, that he was half a century before Mr. Ers-

kine, and the Declaratory Act of Mr. Fox, in asserting the right of the jury to give a general verdict in libel as much as in murder:" Leaders of the Old Bar of Philadelphia, p. 15. The members of our convention of 1790 were familiar with the subject, and the minutes show that much care was given to framing the clause in the Declaration of Rights which refers to it. Section 7 of the Article 9, relating to liberty of the press, was originally reported to the convention by the committee, to draft a proposed constitution, on December 21, 1789, in the following form: "That the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature, or any branch of government, and no law shall be ever made restraining the right thereof. The free communication of thoughts and opinions is one of the most invaluable rights of man, and every citizen may freely speak, write and print, being responsible for the abuse of that liberty:" Proceedings of the Convention, 162 (Harrisburg, 1825). This was reported from Committee of the Whole, on February 5, 1790, in the same form (dropping only the word "most" before the word "invaluable"), but with the addition "but upon indictments for the publication of papers investigating the conduct of individuals in their public capacity, or of those applying or canvassing for office, the truth of the facts may be given in evidence in justification upon the general issue:" *Id.* 174. On February 22, this section being under consideration, Mr. Addison offered as a substitute for the sentence last quoted: "In prosecutions for libels their truth or design may be given in evidence on the general issue, and their nature and tendency, whether for public information or only for public ridicule or malice, be determinded by the jury." To this an amendment, offered by Mr. McKean, to add "under the direction of the Court, as in other cases," was adopted almost unanimously, the vote being 56 to 3; but the substitute itself received a bare majority, 32 to 27, the strong minority being in favor of restricting the truth as a justification to cases of publications upon the conduct of persons in their public capacity, or of candidates for office: *Id.* 220–222. The convention, having ordered the proposed constitution to be published for the consideration of the citizens, adjourned on February 26 to the following August.

On reconvening, the instrument was again taken up for discussion, section by section, and the minority made strenuous

further efforts to restrict the justification to cases of public officers, at one time failing only by the close vote of 30 to 32. During the progress of the debate, an amendment, offered by Mr. Lewis, and seconded by Mr. McKean, that "the jury shall have the same right to determine the law and the fact, under the direction of the Court, as in other cases," was carried, and the clause finally adopted in the form, "in prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is necessary or proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have the right to determine the law and the facts under the directions of the Court, as in other cases:" *Id.* 274–279. It is impossible to read these various steps in the formulation of our fundamental law without seeing that there was never at any time the intention to make or to consider juries as in any sense judges of the law. No such possible construction seems to have been apprehended until suggested by McKean; and the practically unanimous vote, on his motion, to add "under the direction of the Court, as in other cases," shows the feeling of the convention on the subject. McKean was at that time one of the foremost personages of the Commonwealth; perhaps its best trained lawyer. He had studied in the Temple, and was familiar with the details of the legal controversy between Buller and Mansfield, on the one side, and Erskine, on the other, before Fox took it up as a matter of politics; and he knew, as Lewis and Wilson and Ross and Sitgreaves and Addison and Findley and other leaders of the convention knew, that the contest was not for any control by the jury as judges of the law. Even Junius hardly ventured to put his denunciations of Mansfield in that form, but for the right of applying the law to the facts and pronouncing the result by general verdict. And such was the understanding of the convention as it was of Parliament two years later, and such the natural meaning of the language on which they finally settled to express their purpose. It puts beyond question the right to return a general verdict; nothing more. To cut the sentence in two, and say the jury are "to determine the law," is not only to prevent the meaning, but to nullify the other command, that they are to be determined "under the direction of the Court." What they are to determine is "the law and the

facts as in other cases;" that is, the law as given to them by the Court, and the facts as shown by the evidence. They are bound to take the law from the Court; but so taking it, they have the right to apply it to the facts as they may find them to be proved, and to announce the result of the whole by a general verdict of guilty or not guilty. Any other construction would be totally at variance with the fundamental principles of our system of jurisprudence, and with our settled and uncontested practice. It has never been claimed that the jury are to determine what evidence is admissible, or what witness competent; yet if they are judges of the law, they should decide these often most important law points in a case. So as to the sufficiency of an indictment. Again, the jury have a right to return a special verdict, even in a criminal case: Dowman's Case, 9 Coke Rep. 126, 2 Inst. 425; Hargrave's note to Coke Litt., 155 b. It is admitted that they must decide the facts; and if they are judges of the law, then it is their duty to decide it, and they cannot transfer that duty to the Court. The prisoner might demand his right that they should exercise their full functions. But all the authorities are to the contrary; and if the finding of the facts can be separated from the conclusion of law, the latter will be decided by the Judges by their own views. "When a jury find the matter committed to their charge at large, and further conclude against law, the verdict is good and the conclusion ill:" Heydon's Case, 4 Coke, 42 b. "The office of twelve men is no other than to inquire of matters of fact, and not to adjudge what the law is, for that is the office of the Court, and not of the jury; and if they find the matter of fact at large, and further say that thereupon the law is so, where, in truth, the law is not so, the judges shall adjudge according to the matter of fact, and not according to the conclusion of the jury:" Townsend's Case, Plowden 114 b. And see 2 Hale, Pleas of the Crown 302; 1 Chitty, Criminal Law 645.

Much misunderstanding has, in my judgment, been caused in this State by the case of *Kane* v. *Commonwealth*, 89 Pa. 522. In that case the point was to put the Court below, that "the jury are the judges of the law and the fact," and all that this Court decided was that the point should have been affirmed. The language of Chief Justice Sharswood was, however, less guarded than was usual with that eminent jurist, and follow-

ing *State* v. *Croteau*, 23 Vt. 14, he dismisses the perfectly clear and substantial distinction between power and right with a brevity that is scarcely consistent with the weight of the subject. "The distinction between power and right," he says, "whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. No Court should give a binding instruction to a jury which they are powerless to enforce by granting a new trial if it should be disregarded." It is somewhat remarkable that the Chief Justice should assume, as is so commonly done by counsel, that the jury will construe the law more favorably for the prisoner than the Court would. It is only such a construction, too favorable to the prisoner, that the Court is powerless to remedy by a new trial, and that lack of power arises, not because the jury's legal power is the same as a legal right, but because, for reasons of general policy, one verdict of accquittal is a final and irreversable termination of the case. If legal power means legal right, then a jury has a right to acquit any prisoner without regard to either law or evidence, for their power to do so is beyond question, and they cannot be held to any accountability, though they follow the maxim of lynch law, that the murdered man deserved to die anyhow, and therefore his murderer should not be punished, even he no longer seeks refuge behind the thin veil of transitory insanity that began when the shot was fired, and ended when it had killed its man. Whether the distinction between power and right be shadowy and unsubstantial in practice or not, it is clear and vital, and I must repudiate such a confusion of logical as well as moral ideas. A jury may disregard the evidence; but no Judge has ever said it had the legal right to do so; and if the disregard is of the weight of the evidence favorable to the prisoner, the Court sets aside the verdict without hesitation; and even this Court, though it does not pass upon the weight of evidence, does examine its sufficiency, and may on that ground reverse without a new venire. *Com.* v. *Fleming*, 130 Pa. 163; *Com.* v. *Knarr*, 135 Pa. 47; *Com.* v. *Railroad Co.*, 135 Pa. 256; *Com.* v. *Brown*, 138 Pa. 452; *Com.* v. *Ruddle*, 142 Pa. 144, are a few recent instances of the exercise of this power.

So the jury may disregard the law favorable to the prisoner. As was suggested by the learned Judge at the trial of the case

in hand, the jury had the legal power to find murder of the first degree without regard to the element of premeditation; but no Judge would contend that they had the legal right to do so; and if the evidence of premeditation was below the legal standard, determined by the Court as a matter of law, not only would the trial Court set aside the verdict, but this Court would be bound to review the evidence and determine whether the legal elements of murder of the first degree existed in the case. Such powers and such duties in the Courts are absolutely inconsistent with the right of the jury to be in one sense judges of the law.

This is not new doctrine, but the long-established law of the State. Alexander Addison was one of the stanchest asserters of the rights of juries in the Constitutional Convention, and was one of the minority of three who voted against McKean's amendment to insert the words "under the direction of the Court, as in other cases;" but when three years later he presided in the Oyer and Term Terminer of Washington County, he laid down the law in these precise and forcible terms: "Whether the facts are so or so, it lies with you to determine, according as you believe the testimony, supposing them so or so; whether they amount to murder or manslaughter is a question of law for the Court to determine. You may find, according as you believe or disbelieve the facts, and comparing the facts with the rules of law, that the prisoner is guilty or not guilty (of murder) or guilty of manslaughter; or you may find the facts specially, without drawing any conclusion of guilt or innocence, leaving it to the Court to pronounce the construction which the law puts on the facts found; but you cannot, but at the peril of violation of duty, believing the facts, say that they are not what the law declares them to be, for this would be taking upon you to make the law, which is the province of the Legislature; or to construe the law, which is the province of the Court:" *Penna.* v. *Bell*, Add. 160. And in *Com.* v. *Sherry*, an indictment for murder, growing out of the riots of 1844, removed by certiorari from the Quarter Sessions of Philadelphia, and tried in the Nisi Prius in April, 1845, Justice Rogers charged the jury as follows: "You are, it is true, judges in a criminal case, in one sense, of both law and fact; for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a

second prosecution. . . . The popular impression is that this power . . . arises from a right on the jury's part to decide the law as well as the facts according to their own sense of right. But it arises from no such thing. It rests upon a fundamental principle of the common law, that no man can twice be put in jeopardy for the same offence. . . . It is important for you to keep this distinction in mind, remembering that, while you have the physical power by an acquittal to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the Court. The sanctity of your conclusions in case of an acquittal arises not from any inherent dominion on your part over the law, but from the principle that no man shall be twice put in jeopardy for the same offence—a principle that attaches equal sanctity to an acquittal produced by a blunder of the clerk, or an error of the Attorney-General. . . . . You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim, that the law belongs to the Court, and the facts to the jury. My duty is, therefore, to charge you, that while you will in this case form your own judgment of the facts, you will receive the law as it is given to you by the Court:" Wharton on Homicide, Append. 721. To the same effect, though less explicitly developed, are the rulings of Serjeant, J., of this Court, in *Com.* v. *Van Sickle*, Brightly, 73; and by Gibson, C. J., in *Com.* v. *Harman*, 4 Pa. St. 269. And this also seems to have been the later and better considered opinion of Judge Baldwin, whose charge in *U. S.* v. *Wilson*, Bald. 99, is commonly quoted as authority on the other side. See his charge in *U. S.* v. *Shive*, Bald. 512. I do not understand that the case of *Kane* v. *Com.* was intended to overrule or conflict with these decisions; and notwithstanding the latitude of the language of the opinion, the real point decided did not go beyond the affirmation of the right to an instruction that "the jury are the judges of the law and the facts." In the present case, it will be observed that the instruction asked was that the jury are "judges of the law as well as of the facts;" that is, of each, not merely of the joint result of both. For myself, I think even the formula, that the jury are judges of the law and the facts, objectionable as tending to convey to the jury a wrong idea. The language of the Constitution is, that the

jury shall have the right to determine the law and the facts under the direction of the Court. This is the accurate formula, and it means only that they have the right to determine the joint result of the law and the facts by a general verdict. This is the form which ought to be used when instruction on the subject is asked, and it ought to be accompanied by explicit instruction that the jury are not judges of the law, in all cases where there is any apparent danger that the jury will arrogate to themselves such function.

My conclusions on the general subject, therefore, are:

(1) The jury were never judges of the law in any case, civil or criminal, except incidentally, as involved in the mixed determination of law and facts by a general verdict.

(2) Even if it could be conceded that they may have been so in primitive times, their right certainly ceased after the introduction of bills of exception and the granting of new trials, and admittedly has not existed in civil cases for centuries.

(3) That there was not originally, nor is now, any distinction in this respect between civil and criminal cases, the true rule as to both being that "the immediate and direct right of deciding upon questions of law is intrusted to the Judges; in a jury it is only incidental:" Hargrave's note to Coke upon Littleton, 155 b. The idea of a difference in the rights and functions of juries in civil and criminal cases as to the determination of the law arose from a misconception of the controversy over the right to give a general verdict, and was an error for which there is no respectable English authority, and which the best American authorities have overwhelmingly disapproved.

That even if the jury had originally had such right in criminal cases, it was an anomaly, belonging to the period when jurors were selected from the vicinage, because of their knowledge of the case, and, like its conjener, has changed and disappeared because totally inconsistent with the functions of courts and juries as now understood, with sound reason and with common sense. And such change, if change it be, has the sanction of the constitutional provision, that the jury shall determine, "under the direction of the Court," the legislative provisions for bills of exception, the review of the evidence in cases of murder, etc., etc., and of the long-settled and incontestable power of Courts to decide questions of evidence, to set aside verdicts, and grant new trials without limit, except when con-

trolled by the ancient maxim of the common law, embodied in our constitutional Declaration of Rights, that no man shall be twice vexed for the same offence.

This whole subject is discussed with exhaustive learning and ability in *State* v. *Croteaw*, 23 Vt. 14. The opinion of the Court by Hall, J., is the only serious attempt that I have been able to find to support the dogma for which it is now mainly responsible; and, with great respect for that eminent jurist, it appears to me that this whole argument is based on the confusion of the right to determine the law with the right to render a general verdict. A careful examination of all the authorities cited by him (and they include everything which the most learned and diligent research could discover) shows that they only go so far as to sustain the right of the jury not to be judges of or to determine the law, but only to apply it through a general verdict.

The dissenting opinion of Bennett, J., in the same case, displays equal learning and sounder reasoning. It is a storehouse of information on the subject, and has anticipated everything that can be said upon it. A masterly analysis and review, by Chief Justice Shaw, will also be found in *Commonwealth* v. *Anthes*, 5 Gray 185. There are less elaborate but equally clear and forcible statements of the argument by Story, J., in *U. S.* v. *Battiste*, 2 Sumner 240; by B. R. Curtis, J., in *U. S.* v. *Morris*, 1 Curt. C. C. 23, 49; by Gilchrist, J., in *Pierce* v. *State*, 13 N. H. 536; and by Shaw, C. J., in *Commonwealth* v. *Porter*, 10 Metc., Mass. 263. See also *Montgomery* v. *State*, 11 Ohio 427; *Montee* v. *Commonwealth*, 3 J. J. Marshall 149; *Townsend* v. *State*, 2 Blackf. 151 (but see *Armstrong* v. *State*, 4 Blackf. 247); *Pierson* v. *State*, 12 Ala. 153; *Hardy* v. *State*, 7 Mo. 607; *Nels* v. *State*, 2 Tex. 280; *Brown* v. *Commonwealth*, 10 So. East Rep. 745 (Court of App. of Va. 1890); a very able and compendious statement of the controversy in England, while still raging, before the passage of the Libel Act, by Mr. Hargrave, in his note to Coke Litt. 155 b; an article by C. J. Wade, of Montana, in 3 Criminal Law Mag. 484; and one by the late Dr. Francis Wharton, in 5 So. Law Rev. (N. S.) 352 (reprinted in 36 Leg. Intell. 405, and 1 Crim. Law Mag. 47), 7 Dane's Abridg. 381–3; 2 Boston Law Rep. 187; 15 *Id.* 1; and 13 LAW REGISTER (N. S.) 355.

As already stated, there is not a single respectable English

authority for the doctrine in question; and against the foregoing solid phalanx of the best American judicial and professional opinions I have not been able to find a single well-considered case, except *State* v. *Croteau*, which, as already seen, was by a divided Court. Under these circumstances, whether the doctrine be of much practical importance or not, I cannot help thinking it a matter of regret that any vestige of it should be left in Pennsylvania.

The subject which is so ably discussed by Mr. Justice Mitchell in the foregoing opinion is one which has commanded the attention of the brightest minds both of Bench and Bar. During the sixteenth and seventeenth centuries this question was, perhaps, considered of greater importance than it is at the present day; for when the doctrine that juries had a right to decide both the law and the facts was first claimed the people of England were engaged in that mighty struggle between the tyranny of the king and his judges on the one hand, and the liberty of the masses on the other.

The Judiciary have endeavored, in many cases, to compel juries to take the law as given to them from the Bench, but in many other cases the Courts have decided that juries were not bound to be governed by the instructions of the presiding Judge.

The following is a brief summary of the decisions in some of the cases in which the question has arisen:

In *Lilburne's Case*, 2 Hargrave's St. Tr. 79 (1649), the jury acquitted a prisoner charged with treason, and declared that they were the judges of the law as well as of the facts, although the Court had told them otherwise. This case seems to have been an entering wedge, and in the reign of King Charles II the doctrine was firmly established.

About 1667, Chief Justice Kelynge fined the members of a grand jury because they would not return a bill of indictment for murder. He told them that the defendant having taken the life of the deceased, it was their duty to find a true bill, as it was a matter of law for the Court whether it was murder or self-defence. He also fined several petit juries for refusing to act under his instructions, and for returning a verdict of manslaughter when he told them it was murder. These acts of the Chief Justice having come to the notice of Parliament, a committee of that body reported that the proceedings were "innovations in the trial of men for their lives and liberties, and that he had used an arbitrary and illegal power which was of dangerous consequence to the lives and liberties of the people of England," and also recommended the punishment of the Judge: 6 St. Tr., 992–1019 (1670).

In 1670, William Penn and another were tried in London for a breach of the peace. The alleged unlawful act consisted in the assembling of about two hundred and fifty persons to hear an address by Penn. The defendants contended that there had been no unlawful assembly, and read from Lord Coke to the jury in support of their posi-

tion. The Court charged strongly against the prisoners; but the jury, in spite of the Judge, returned a verdict of acquittal. The Court then fined the jurors and committed them to jail. One of these named Bushell obtained a writ of *habeas corpus*, and the question of whether the jury had the right to decide the case "contrary to the direction of the Court in matter of law" was argued before the Court of King's Bench. The prisoner was discharged, in an opinion delivered by Chief Justice Vaughn: *Bushell's Case*, Vaughn, 135–158 (1670).

In fact, the power of granting new trials, even in civil cases, was not recognized until after the middle of the seventeenth century; for previous to that time the jury were alone responsible for any error of law in their general verdict, and had the right to determine the law according to their own judgment: *State* v. *Croteaw*, 23 Vt., 21.

The attainder of Sir Algernon Sidney in 1683 was reversed by Parliament, and the doctrine laid down by the trial Judge, that the jury must abide by the law as given to them by the Court, was denied and reprobated. Another important case soon after this, was the case of the *Seven Bishops*, 12 St. Tr., 183 (1688), where the jury exercised the right of deciding the law for themselves.

In *King* v. *Dean of St. Asoph*, 3 Term Rep., 429 (1784), it was held that the whole question of the criminality of a publication was withdrawn from the jury. This decision was opposed by many of the Judges; and finally, in 1792, the Fox Libel Act was passed, which affirmed the right of juries in prosecutions for libel to give general verdicts. A ballad which was in vogue at that time, and which is mentioned in a note to *State* v. *Croteaw*, *supra*, is as follows:

> For twelve honest men
> Have decided the cause,
> Who are judges alike
> Of the facts and the laws.

This right is explicitly admitted by Coke: *Coke Litt.*, 228, a.

Blackstone, in his Commentaries, page 361, says: "The jury have an unquestionable right to determine upon all the circumstances, and to find a general verdict, if they think so proper to hazard a breach of their oaths." Quoting from Sir Matthew Hale he says: "If the Judge's opinion must rule the verdict, the trial by jury would be useless."

In the United States, one of the first cases was the trial of Henfield for illegal privateering, reported in Wharton's St. Tr., 88 (1793), and in which the Judge told the jury that they were the judges of the law as well as of the facts.

On the trial of Fries for treason in 1800, Judge Chase, of the United States Supreme Court, said, in charging the jury, that "it was the duty of the Court, in that and all criminal cases, to state to the jury their opinion of the law arising on the facts, but that the jury were to decide, in that and all criminal cases, both the law and the facts on their consideration of the whole case: *State* v. *Croteaw*, *supra*.

On the impeachment of Judge Chase it was testified by Mr. Tighlman, of Pennsylvania, that "the usual practice in the Courts, in which he had been, was for the Court to permit the counsel on both sides to argue the law to the jury at length," and, when they had finished, the Judge would charge what, in his opinion, was

the law, but informed the jury that they were "the judges of the law and the fact:" Chase's Trial, 27 (1804).

On the trial of Smith and Ogden, 236 (1806), the Judge charged the jury that "it was a well-settled rule of law that the right appertained to them to decide the law as well as the facts, in criminal prosecutions."

In *People* v. *Croswell*, 3 Johnson's Cases, 337 (N. Y., 1804), the Court were equally divided as to whether the intention of the defendant in publishing the libel should have gone to the jury. This case caused much discussion throughout the State, and gave rise to the Act of Assembly of 1805, which provided that "the jury who shall try the same [the cases of libel] shall have a right to determine the law and the fact, under the direction of the Court, in like manner as in other criminal cases." See opinion of Judge Hall, in *State* v. *Croteau*, *supra*.

In *Coffin* v. *Coffin*, 4 Mass., 25 (1808), it was decided that "the issue involved both law and fact, and the jury must decide the law and the fact."

The maxim "*ad questionem facti non respondent judices, ad questionem legis non respondent juratores*" has reference merely to questions of law and fact that stand on the record, and does not apply to legal questions arising incidentally out of an issue of fact. "Where law and fact are blended, as they must be in the general issue, it is impossible to decide the one without the other, and, therefore, in all such cases, the juries, if they decide at all, must, *ex necessitate*, decide the law as well as the fact:" *State* v. *Allen*, 1 McCord, 525 (1822).

In *U. S.* v. *Wilson*, 1 Baldwin, 99 (1830), Mr. Justice Baldwin charged the jury as follows: "We have thus stated to you the law of this case under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand that you are the judges both of the law and the fact in a criminal case, and are not bound by the opinion of the Court; you may judge for yourselves; and if you should feel it your duty to differ from us, you must find your verdict accordingly. At the same time it is our duty to say that it is in perfect accordance with the spirit of our legal institutions that Courts shall decide questions of law, and the juries of fact; the nature of the tribunal naturally leads to this division of duties, and it is better for the sake of public justice that it should be so: when the law is settled by a Court there is more certainty than when done by a jury; it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so."

Com. v. *Knapp*, 10 Pickering, 447 (1830), and *Com.* v. *Kneeland*, 20 *Ibid.*, 222 (1838), hold that in criminal cases the jury are judges of the law so far as it is involved in the general question of guilty or not guilty.

In *Armstrong* v. *State*, 4 Blackford, 247 (1837), the defendant was indicted for keeping a gaming house, and his counsel asked the lower Court to instruct the jury that they were judges of the law as well as of the facts; but the Court

refused so to charge. On appeal it was held that the learned Judge erred in not giving the instruction asked for by defendant.

This case overruled *Townsend* v. *State*, 2 Blackford, 151 (1828), in which it was held that the jury were bound to receive the law as given to them by the Judge. See, also, *State* v. *Snow*, 18 Maine, 246 (1841); *Doss* v. *Com.*, 1 Grattan, 559 (1844).

In *State* v. *Croteaw*, 23 Vt., 21 (1849), which is a leading case in support of this right of juries, Judge Hall says: "The history of English criminal jurisprudence furnishes abundant evidence . . . that the power of juries to determine the law as well as the facts in criminal trials was essential to the protection of innocence and the preservation of liberty." This case is approved of in *State* v. *Barron*, 37 Vt., 57 (1864).

State v. *Tully*, 23 La. An., 677 (1871), holds that the jury are the judges of the law and the facts; and although they ought to receive the law as laid down by the Court, they are under no compulsion to do so. *State* v. *Saliba*, 18 *Ibid.*, 35 (1866), is followed.

In *Mullinix* v. *People*, 76 Ill., 211 (1875), the Supreme Court decided that a jury could disregard the directions of the Judge if they think on their oaths that they are better judges themselves. This case follows *Schnier* v. *People*, 23 Ill., 17 (1859), and *Falk* v. *People*, 42 Ill., 331 (1866).

Some cases, although they admit the power of the jury to decide the law, by a general verdict, nevertheless deny that they have a moral right so to do. The following cases answer or assume to answer his proposition.

In *People* v. *Croswell*, 3 Johnson's Cases, 368 N. Y. (1804), Chancellor Kent said: "While the power of the jury is admitted, it is denied that they can rightfully or lawfully exercise it without compromising their consciences, and that they are bound in all cases to receive the law from the Court. The law must, however, have intended in granting this power to a jury to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it. The true criterion of a legal power is its capacity to produce a definite effect liable neither to censure nor review, and the verdict of not guilty, in a criminal case, is, in every respect, absolutely final."

In *State* v. *Jones*, 5 Ala., 666 (1843), the Supreme Court said: "The power of the jury to judge both of law and fact results necessarily from the very constitution of that body and from their right to find a general verdict for the prisoner which the Court cannot disturb. . . . This right of the jury is doubtless one of inestimable value, especially in those cases where it may be supposed the government has an interest in the conviction of the criminal. . . . Whether they will receive the law from the Court must be left to their own discretion under the sanction of the oath they have taken."

Judge Hall said, in *State* v. *Croteaw*, *supra*, that "the power of juries to decide the law as well as the fact involved in the issue of not guilty, and without legal responsibility to any other tribunal for their decision, is universally conceded. In my opinion such power is equivalent to right. . . . That

there is a distinction in morals between power and right is undoubtedly true ; . . . but this distinction has no application to questions of political power." When a power is given to the different officers or departments of a government, the fact of such assignment of power implies that it may be lawfully and rightfully exercised. As to the objection, that the jury can abuse the power, it is to be answered that any person in a position of responsibility may do so. They are sworn to do their duty, and it is to be presumed that they will regard their oaths. "I conclude, then, that when political power is conferred on a tribunal without restriction or control, it may be lawfully exerted."

In *State* v. *McDonnell*, 32 Vt., 532 (1860), the Supreme Court said that if juries are made to feel that they have the power and the right to decide the law in a criminal case, over the head of the Judge, if they care to take the responsibility, they will not do so in practice, except in extreme cases. Judges are liable to err, and even Courts of last resort, so that "the modification of the common-sense instincts of the more unsophisticated" is required. "This, in civil cases, is well enough left to the interference of the legislature; but in criminal cases, affecting life or character or liberty, such a resort would come too late."

In a note to *State* v. *Buckley*, 13 AM. LAW REG. (N.S.), 358 (1874), it is said: "For since it is clear the jury have the right to rejudge any question of law involved in a criminal cause, and to settle it in their own way, without regard to the directions of the Court, and thus acquit the accused by a general verdict, upon the mere fancy that the law is not wise or useful, . . . and such verdict will be final, . . . there seems no great use in having much controversy upon the question whether this is the legitimate right of the jury, or only a power which juries sometimes assert, in vindication of what they may, rather indefinitely, call justice."

Kane v. *Com.*, 89 Pa., 522 (1879), is a leading case in favor of this right of juries, and is justly entitled to much weight on account of the learning and ability of Mr. Chief Justice Sharswood, who delivered the opinion of the Court. He says: "The distinction between power and right, whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right."

The other side of this interesting question is so fully discussed by the learned Justice that it will be only necessary to give a very short review of a few of the cases.

In *Townsend's Case*, Plowden, 111 (1554), the jury undertook to decide a point of law, and the finding was reversed because it was said that "it is not the duty of jurors to judge what the law is."

The Court said, in *King* v. *Oneby*, 2 Ld. Raymond, 1485 (1727), that it is "properly the province of the Court to determine what acts afford proof of malice."

In *King* v. *Poole* Cases, Temp. Hardwicke, 28 (1770), it is said "that the point of law is not to be determined by juries ; juries have a power by law to determine matters of fact only, and it is of the greatest consequence to the law of England and to the subject that these powers of the Judge and jury are kept distinct; that the Judge determine the law, and the jury the fact."

Chief Justice Best said in *Levi* v.

Milne, 4 Bingham, 199 (1827): "I mean, however, to protest against juries, even in criminal cases, becoming judges of the law; the act only says the jury may find a general verdict." The act referred to is Fox's Libel Act.

The Constitution of Kentucky empowered the jury in libel cases to be judges of the law "under the direction of the Court." Held, that the jury have the legal right to disregard the instructions of the Judge, but not the moral right to do so: *Montee* v. *Com.*, 3 J. J. Marshall, 149 (1830).

It was decided in *U. S. Battiste*, 2 Sumner, 243 (1835), that in criminal cases the jury are no more judges of the law than in a civil case tried upon the general issue. In each they have the physical power to disregard the law as laid down by the Court, but they have not the moral right to decide the law, according to their own notions.

The Supreme Court said in *Hardy* v. *State*, 7 Mo., 607 (1842): "It is difficult to conceive how the Criminal Court could consistently tell the jury they were the judges of the law, after having undertaken to tell them what was the law of the case." It is the duty of the Judge to instruct the jury as to the law, and the duty of the jury to respect their instructions and to convict or acquit the prisoner according to the law as delivered to them by the Court in the same manner as they receive the evidence from the witnesses.

Pierce v. *State*, 13 N.H., 536 (1843), and the dissenting opinion in *State* v. *Croteaw*, *supra*, are leading cases to the same effect.

In *Com.* v. *Porter*, 10 Metcalf, 263 (1845), the Supreme Court said that the Judge should give instructions to the jury on all questions of law which arise in the case, and it is their duty to receive the same from the Court, and to conform their judgment to such instructions. They are as much bound by their oaths to do this as they are bound to decide all questions of fact according to the evidence.

Nels v. *State*, 2 Texas, 280 (1846) says: "The jury are the exclusive judges of the facts; . . . for their law it is their duty to look to the Court."

In *Pierson* v. *State*, 12 Ala., 149 (1847), it is said that the Court is the proper person to explain the law to the jury, and that the latter have no control over it, except in so far as they can return a general verdict.

Judge Curtis, in *U. S.* v. *Morris*, 1 Curtis, 23 (1851), holds, in a very exhaustive opinion, that, under the Constitution and laws of the United States, the jury are not the judges of the law, in a criminal case. The jury are to be told what the law is, and they are bound to consider that they have been told truly. If the contention, that juries are the judges of the law, is true, we have a body chosen without reference to their qualifications to decide questions of law, not allowed to give reasons for their decisions, and yet possessing complete power to determine that an act passed by the legislative department is invalid. "The practical consequences of such a state of things are too serious to be lightly encountered."

In New York the case of *Carpenter* v. *People*, 8 Barbour S. C. R., 610 (1850), decided, that "the idea, which has become somewhat current in some places, that in criminal cases the jury are the judges of the law as well as the facts, is erroneous, not being founded upon principle or supported by authority."

In *Com.* v. *Anthes*, 5 Gray, 185

(1855), the Supreme Court of Massachusetts held that the legislature could not confer on the jury, in criminal trials, the rightful power to determine questions of law, involved in the issue, contrary to the instructions of the Court.

Even at common law the jury in criminal cases were bound to take the law as given to them by the Court: *Williams* v. *State*, 10 Ind., 503 (1858).

The Supreme Court of Pennsylvania, in *Nicholson* v. *Com.*, 96 Pa., 503 (1880), affirmed the charge of the lower Court, in which the jury were told that the only safe course for them to pursue was to receive their instructions from the Judge, for the reason that they are not supposed to be learned in the law.

In Georgia the juries are judges of the law as well as of the facts, in criminal cases, but they should accept the law as laid down by the Judge: *Hunt* v. *State*, 7 S. E. Rep., 142 (1888).

A statute of Massachusetts provided that "the jury shall try, according to established form and principles of law, all criminal causes committed to them, and, after having received the instructions of the Court, shall decide in their discretion both the fact and the law involved in the issue." Held, not to authorize the jury to decide questions of law contrary to the instructions of the Court: *Com.* v. *Marzynski*, 21 N. E. Rep., 228 (1889).

In Virginia *Brown* v. *Com.*, 10 S. E. Rep. 745 (1890), holds that "although authorities may be found in support of the doctrine contended for by the prisoner (for at one time it was a popular one) it is not founded in principle." The fact that the jury may acquit contrary to the direction of the Court and their verdict will be final is not based on their right to determine the law of the case for themselves, but on the principle of law that no man can be twice put in jeopardy for the same offence.

Drake v. *State*, 20 At. Rep., N. J., 747 (1890), gives a discussion on the province of Court and jury in libel cases.

The late Dr. Wharton gives a very thorough review of the whole subject in his book on Criminal Law, Vol. III, Sec. 3263, and in an article published in 1 Crim. Law Mag., 47. He says that the better opinion now is that juries are not judges of the law in criminal cases. Another article to the same effect by Chief Justice Wade, of Montana, is to be found in 3 Crim. Law Mag., 484.

Judge Cooley, in his work on Constitutional Limitations, 396 (Edition of 1890), says: "It is the duty of the jury to receive and follow the law as delivered to them by the Court; and such is the clear weight of authority;" and in his edition of Story on the Constitution it is laid down that juries are not judges of the law in criminal cases in the Federal Courts: 1064 n., 1780 n.

C. PERCY WILLCOX.